SUBJECT INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6520

KINNEY KINMON LAU, *et al.*,
Petitioners,

v.

ALAN H. NICHOLS, *et al.*,
Respondents.

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE CALIFORNIA TEACHERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF THE AMICI CURIAE

All parties have consented to the filing of this brief on behalf of the National Education Association and the California Teachers Association as amici curiae in support of the petition for a writ of certiorari.[1]

The National Education Association ("NEA") is an independent voluntary organization of educators open to any person who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. NEA

[1] The consents of both the petitioners and the respondents are being filed with the Clerk of the Court in accordance with Rule 42(2) of the Rules of the Court.

was founded in 1857, chartered by Congress in 1906, and has over one million one hundred thousand members. The California Teachers Association ("CTA"), the California state affiliate of NEA, has over 140,000 regular members. One of the principal purposes of the NEA and the CTA is to promote the education of American children. 34 Stat. 805.

The interest of the amici curiae in this case stems from that purpose. The case presents the question whether the Equal Protection Clause of the Fourteenth Amendment[2] permits a public school system to instruct non-English-speaking children all day in classes taught in English, without making any effort to assist the children in learning English, thus effectively excluding many of the children from the benefits of public education. The NEA and the CTA are concerned with the plight of non-English-speaking students trapped in schools where they cannot learn, and in 1972 the Representative Assembly of NEA adopted a formal continuing resolution urging the provision of "necessary funds and . . . material . . . for students to whom English must be taught as a second language." NEA 1973 Handbook, at 55. But the court below, asserting that the children's problem is

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[2] The case also presents the question whether the practices of respondents, who receive federal aid (Def. Ans. to Int., Ex. B), violate Title VI of the Civil Rights Act of 1964, which provides that no person in the United States shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance" because of his "race, color or national origin." 42 U.S.C. 2000d. We think it clear that the effective exclusion of a group of children identifiable by national origin—as non-English-speaking children are—violates the 1964 Act, a view supported, we note, by HEW regulations. See HEW, "Identification of Discrimination and Denial of Services on the Basis of National Origin," 35 Fed. Reg. 11595 (Ptn. 3, 26a). Accordingly, we support Petitioners' contentions regarding the 1964 Act (Ptn. 16). In this memorandum, however, we confine ourselves to the Equal Protection question.

> "the result of deficiencies created by [the children] themselves in failing to learn the English language" (Ptn. 12a)

held that the requirements of the Equal Protection Clause are satisfied as long as the school system provides the children

> "with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district." (Ptn. 11a.)

That holding sanctions the effective exclusion from public education of a substantial number of non-English-speaking school-age children in the United States today. The practical exclusion of any large group of children from public education, because of factors for which the children themselves are not responsible, is a matter of the gravest concern to those who, like the amici, are interested in the education of American children.[3]

REASONS FOR GRANTING THE WRIT

1. Under the decision below, several million children can be denied the benefits of public education.

Petitioners represent 1790 Chinese-speaking children who live in San Francisco, who need help in learning English in order to benefit from the classroom programs they are required to attend, and who receive no such instruction. They are required to sit uncomprehendingly in classes in which they cannot participate and from which they cannot benefit—classes designed only to meet

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[3] The NEA and its State affiliates have participated as *amici curiae* in numerous cases before this Court involving the provision of equal educational opportunity. *E.g., School Board of the City of Richmond, et al.* v. *State Board of Education, et al.*, No. 72-549; *Keyes, et al.* v. *School District No. 1, et al.*, No. 71-507; *San Antonio Independent School District* v. *Rodriguez*, 41 U.S.L.W. 4407 (Mar. 21, 1973).

the educational needs of English-speaking children in San Francisco. Unless and until these 1790 children somehow manage to learn English without professional assistance, they will be excluded, through no fault of their own, from the opportunity for an education that the state offers all their peers. As the district court observed, "They are not studying and they are not learning . . . , you can't call them students. They need something, and that something is language instruction." (Tr. 18.)[4]

These 1790 children in San Francisco are but a tiny fraction of the non-English-speaking children in the United States who need to learn English before they will be able to understand what is being taught in their classrooms. According to the United States Commissioner of Education, there are more than 5 million non-English-speaking school-age children in the United States who need instruction in the English language if they are to benefit from the curriculum of the school districts in which they reside.[5] To deprive these children of such instruction is to deprive them of the opportunity for an education that is provided for their peers. The lower court's decision authorizes such a deprivation.

The importance of the issues involved in the case is confirmed by the fact that they are not confined to this case alone but are also the subject of other recent litigation. In *Serna* v. *Portales Municipal Schools*, No. 8994 Civil, Nov. 14, 1972, the United States District Court for

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[4] A similar situation exists with respect to Spanish-speaking children in San Francisco. The record indicates that there are nearly two thousand Spanish-speaking children in San Francisco who need special instruction in English, of whom only one-third receive such instruction. (Def. Ans. to Pl. Int. 18.)

[5] Testimony of Dr. Sidney Marland, U.S. Commissioner of Education, Hearings Before Subcommittee of the House Committee on Appropriations, 92nd Cong., 2d Sess., at 677 (Feb. 28, 1972).

New Mexico held that the "promulgation and institution of a program by the Portales School District which ignores the needs of [Spanish-speaking] children" constitutes impermissible state action under the Equal Protection Clause.[6] On the other hand, in *Morales* v. *Shannon*, No. DR-70-VA-14, Feb. 13, 1973, the United States District Court for the Western District of Texas expressed a contrary view, relying on the decision of the Ninth Circuit in this case.[7]

Moreover, the effects of the decision below are not limited to the 5 million non-English-speaking children. The court below held that the school system's responsibility to the petitioners under the Equal Protection Clause

> "extends no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district." (Ptn. 11a.)

If that is so, it would be permissible to expect blind children to read textbooks they cannot see and to require deaf children to understand lectures they cannot hear as long as the textbooks and the lectures were the same as those "provided to other children." Similarly, school authorities could ask children in wheelchairs to make their own way to classrooms accessible only by

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[6] See also *United States* v. *Texas*, 342 F. Supp. 24 (E.D. Tex., 1971), *aff'd*, 466 F.2d 518 (5th Cir., 1972) (ordering bilingual education as an aid to the elimination of the effects of past segregation).

[7] *Morales* differs from the case at bar in that the plaintiffs in *Morales* claimed that under the Fourteenth Amendment they were entitled to a particular kind of program, specifically, a "bilingual" program, to deal with their English language deficiencies. The petitioners in the case at bar are making no such contention in this Court. Rather, they contend only that leaving them without any assistance in comprehending what goes on in their classrooms denies them their constitutional right to an equal opportunity for education.

climbing a flight of stairs—as long as they were the same facilities "provided to other children." Under the decision below, all such children constitutionally can be denied the benefits of public education.[8]

2. The decision below will affect petitioners' ability to participate in the political and economic life of the nation.

The decision below sanctioned the refusal of school authorities to teach English to petitioners. The adverse impact of that decision cannot be overestimated. The court below recognized that "an appreciation of English is essential for an understanding of legislative and judicial proceedings, and of the laws of the State . . . and the nation." But the effect of the decision is even broader. The United States Commission on Civil Rights, which recently published studies that show that the failure to teach English to Spanish-speaking children effectively excludes these children from the benefits of educational programs (*Mexican-American Education Study* (1971), at 16), has said, "Ability to communicate is essential to attain an education, to conduct affairs of state and commerce, and, generally, to exercise the rights of citizenship." U.S. Commission on Civil Rights, *The Excluded Student* 13 (May 1972). In the political arena, petitioners, as non-English-speaking citizens, are cut off from effective participation in electoral politics. Economically, as the record discloses and respondents admit, non-Eng-

[8] We note that while the holding of the court below that no attention need be paid to the educational problems of particular students means that an education could be denied to blind and deaf children as long as the same books and facilities are made available to those children that are made available for other children, granting relief to petitioners would not mean that all handicapped children would likewise be entitled to relief. Under the Equal Protection Clause, the validity of any particular practice that effectively excludes children from the benefits of education would depend upon whether rational grounds exist for the practice.

lish-speaking children "frustrated by their inability to understand the regular work" are doomed to become "dropouts" and "unemployable[s] in the ghetto." (P.X. 5, 3a, 4a, 6a.)

Petitioners, respondents, and the Civil Rights Commission are not alone in attaching importance to the educational needs of non-English-speaking children. They are joined by the Congress, which has recently enacted bilingual education legislation to encourage the States to establish appropriate programs for children like the petitioners[9] (70 U.S.C. § 880(b)), and by the Department of Health, Education and Welfare, which recently issued guidelines providing that federally assisted school systems (like San Francisco's)[10] should "take affirmative steps to rectify language deficiency" where "inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district" (35 Fed. Reg. 11595; Ptn. 26a).

3. The case presents a substantial equal protection issue.

Finally, while this is not the place to discuss the merits of the case in any detail, we do think it clear that petitioners' equal protection claim is substantial.

The court below grossly mischaracterized the issue in stating that the question presented is whether petitioners are entitled to something other children do not receive

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[9] As Senator Murphy from California told his colleagues: "Senators, for a minute, imagine what it would be like if you or your youngster were to enter the first year of school where the language of instruction is different from the one you used and spoke at home. You would not only have to master a new language, but also master a subject in the new language. Would it come as a surprise if you became frustrated and fell behind, discouraged and dropped out?" Statement Before Senate Appropriations Committee, 115 Cong. Rec. S 16989 (December 17, 1969).

[10] Def. Ans. to Int., Ex. B.

—something in addition to "the same facilities, textbooks, teachers and curriculum . . . provided to other children." As we understand petitioners' claim, it is only that since other children are being educated, they are constitutionally entitled to be educated too. To be sure, they ask to be taught English in order to profit from their classes, in which English is the sole language of instruction. But the San Francisco schools provide a variety of special programs to meet the special educational needs of particular children, such as special education for physically and mentally handicapped children. (*E.g.*, P.X. 4; Ptn. 12 n. 13.) In these circumstances, petitioners are asking for nothing more than is made available for other children as a matter of course, an educational program from which they can reasonably be expected to benefit.

It is difficult to conceive of any rational and legitimate state objective that could possibly be served by the refusal to afford petitioners the instruction they need. The state interest[11] suggested by the court below—far from rationally justifying San Francisco's practices—is one that can be served only by giving petitioners the relief they seek. The court below said,

> "[T]he state's use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established. This is an English-speaking nation. Knowledge of English

[11] We note that San Francisco has never claimed that expense justifies its treatment of petitioners—perhaps because there is no reason to suppose that "ESL" (English as a Second Language) classes, see note 12 *infra*, are more expensive than other kinds of classes offered by the public schools. In any event, expense would not be a legitimate excuse for an otherwise impermissible discrimination, *Shapiro* v. *Thompson*, 394 U.S. 618, 620 (1969), and therefore is no excuse for refusing to provide an education for some children while providing it for others.

> is required to become a naturalized United States citizen, 8 U.S.C. § 1423(1); likewise, California requires knowledge of the language for jury service, Cal. Code Civ. P. § 198(2), (3). Similarly, an appreciation of English is essential for an understanding of legislative and judicial proceedings, and of the laws of the State, Cal. Const. art. IV, § 24; Cal. Code Civ. P. § 185, and the nation." (Ptn. 11a.)

Accordingly, it is the statutory "policy of the state to insure mastery of English by all pupils in the schools. . . ." Cal. Educ. Code § 71.

These are not considerations that justify the *refusal* to assist petitioners in learning English. To the contrary, these considerations suggest that petitioners *should* be given language instruction in English. While it is true that there is no unanimity among experts as to the best approach to the instruction of children in a new language,[12] there is no responsible support for San Francisco's ostrich-like approach to petitioners—simply ignoring their needs. Indeed, the San Francisco school authorities agree with everyone else on that point—as the record demonstrates. See P.X. 3, 5.

Moreover, as petitioners point out, the respondents' practices involved in this case operate only to exclude children who have a non-English-speaking national origin from the benefits of public education. The practices therefore give rise to a "suspect" classification—one that calls for strict scrutiny by this Court and one that can only be justified if it serves a compelling state interest. Clearly the classification serves no such compelling interest. In fact, for reasons stated above, the effective exclu-

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[12] Two approaches are frequently used: "bilingual" programs, taught by bilingual teachers who understand the student's original language, and "ESL" programs (English as a Second Language), taught by trained teachers who speak only English. See Andersson and Boyer, Bilingual Schooling in the United States, vol. 1, at 12 (G.P.O., 1969).

sion of petitioners from the benefits of education serves no rational state objective of any kind. Therefore, under any test, the exclusion of these children cannot be reconciled with the requirements of equal protection.

In these circumstances, we believe the decision below was erroneous. In any event, the constitutional issue clearly is substantial. In view of the substantial nature of the constitutional question, the large number of children whose educational rights are threatened by the decision below, the impact of a denial of education on the ability of these children to participate in the political and economic life of the nation, and the importance attached to the issue by Congress, the Executive Branch, independent agencies, and respondents themselves, we respectfully submit that this case deserves review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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